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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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REC 19 1994

In the Matter of)	
)	
Revision of Part 22 of the Commission's)	
Rules Governing the Public Mobile Services)	CC Docket No. 92-115
)	
Amendment of Part 22 of the Commission's)	CC Docket No. 94-46
Rules to Delete Section 22.119 and Permit)	RM 8367
the Concurrent Use of Transmitters in)	
Common Carrier and Non-common Carrier)	
Service)	
)	
Amendment of Part 22 of the Commission's)	CC Docket No. 93-116
Rules Pertaining to Power Limits for)	
Paging Stations Operating in the 931 MHz)	
Band in the Public Mobile Service)	

To: The Commission

LIMITED PETITION FOR RECONSIDERATION

PCS Development Corporation ("PCSD"), by its attorneys and pursuant to FCC Rule Section 1.106, petitions for limited reconsideration of the Commission's September 9, 1994 Report and Order to the extent it prohibits the shared use of transmitters by different licensees. See FCC 94-201, 9 FCC Rcd ____ (1994). As PCSD explains below, the Commission's decision to prohibit different licensees from sharing transmitters will serve to further stifle the ability of designated entities to compete in providing spectrum-based services and result in an overall inefficient use of resources for licensees and the public. Accordingly, the Commission should reconsider its decision and delete that restriction from its revised rules.

1. PCSD is a Delaware corporation which recently submitted the winning bids for five 50/50 KHz paired regional narrowband Personal Communications Services ("PCS") licenses in the Commission's regional narrowband spectrum auction, which closed November 8, 1994. PCSD classifies as a designated entity under the Commission's rules in

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that it is a small, minority and/or female owned business.^{1/} As a winner in the regional narrowband auction, PCSD will face significant build-out requirements in constructing its systems, which will be further impacted by the Commission's decision to prohibit the shared use of transmitters.

2. In its Report and Order, the Commission determined to abolish Section 22.119, which prohibits the joint licensing of common carrier and private carrier paging system transmitters. The Commission agreed with the various commentors who noted that the restriction unnecessarily increased the cost of service by requiring duplicate dedicated transmitters even though licensees had spare capacity, and that the effect of such a regulation could be to unnecessarily restrict the development of wide area and nationwide paging systems by raising the marginal cost of establishing such communications systems. PCSD fully supports that decision for the reasons the Commission has explained.

3. Although the Commission's decision to allow the shared use of transmitters to provide both private carrier paging and public land mobile service is fully reasoned and consistent with the public interest, PCSD disagrees with the Commission's decision not to allow different licensees to share transmitters. In reaching this decision, the Commission asserted that it was concerned that the shared use of the same transmitter by two different licensees may raise questions regarding the control and responsibility for the transmitter. In addition, the Commission stated that it was

^{1/} Definitions of designated entities for narrowband PCS purposes are set forth in FCC Rule Sections 24.320 and 1.2110.

concerned about the broader service disruptions that outages of shared transmitters would cause. As PCSD explains below, these assertions are no reason to prohibit the shared use of transmitters, given the burden such a prohibition will have on designated entity PCS licensees as they construct their systems. Moreover, shared use has been in existence for decades and there is no evidence that such shared transmitting facilities create substantial control, responsibility or reliability problems.

I. No substantial control, responsibility or reliability issues are raised by multiple licensees sharing transmitters.

A. The Commission's unspecified "concerns" do not justify prohibiting shared transmitters.

4. In the Report and Order, the Commission states it is concerned that shared use of transmitters by multiple licensees may raise questions regarding the control and responsibility for those transmitters. However, this assertion stands by itself, without any supporting evidence or explanation for the Commission's concerns. Indeed, the Report and Order fails to articulate exactly what is the Commission's concern with respect to shared use. Such a failure does not constitute reasoned decision making.^{2/} Each

^{2/} Quite simply the possibility that a question may exist as to control and responsibility is not a valid basis to formulate a regulation prohibiting use of shared transmitters. In the exercise of reasoned decision making, the Commission is obligated to investigate to determine whether or not such issues exist, identify those issues with enough specificity that a reviewing authority can understand the Commission's reasoning, and resolve them by reference to the public interest standard. Merely pointing out vague concerns without any relation to the public interest standard fails to comport with reasoned decision making. See generally, Motor Vehicle Manufacturers Assn. v. State Farm Mutual Insurance Co., 463 U.S. 29, 43 (1983); Camp v. Pitts, 411 U.S. 138 (1973).

licensee sharing use of a transmitter is responsible for the operation of that equipment and has a duty to maintain control of and properly operate it.^{3/} This is no different conceptually than any other shared facility.^{4/} Should a transmitter operate improperly, then each licensee owes a duty to the Commission and the public to correct the improper operation.

B. Shared transmitters are likely to be more reliable than non-shared transmitters.

5. Contrary to the Commission's concerns with more than one licensee using a transmitter, these would be greater likelihood of proper operation of equipment. With shared use, a licensee could be even more watchful of a transmitter's operation since it would face liability for the potential error of another user of the same transmitter. These circumstances should alleviate the Commission's concern that shared use of transmitters might create broader service outages. On the contrary, with multiple parties monitoring the same transmitter, an outage is likely to be detected more quickly, and as a result, would be repaired more quickly. The benefits of dual monitoring would be particularly evident in rural areas, where multiple users of a transmitter create the opportunity for earlier detection of outages, and where multiple maintenance staffs will help to assure more reliable service. As a result, the

^{3/} No issue of unauthorized control is raised by sharing since by definition the Commission has authorized each party to exercise control over its radio system using the transmitter.

^{4/} For example, with respect to transmitting antenna structures, all licensees operating from such a structure are responsible for compliance with marking and lighting requirements.

public would be better served in having multiple parties responsible for the same transmitter.

C. No substantial issue of control is presented by sharing transmitters.

6. Moreover, the Commission's concern here regarding control and responsibility is at odds with long standing industry and agency practice. In Radio Relay Corp.- Texas, 46 Rad. Reg. 2d (P&F) 157, 162-64 (Com. Car. Bur. 1979), the Commission approved an applicant's sharing of another licensee's transmitter facilities. Indeed the Commission stated that it encouraged such shared use and time-sharing agreements.^{5/} No concern was expressed in that case with respect to issues of control or responsibility; nor as discussed below has the Commission ever expressed such concern when authorizing the shared use of transmitters by multiple licensees in a number of other services.

7. The sharing transmitters by multiple licensees has been specifically approved in the private radio service. See Amendment of Part 90, 90 F.C.C.2d 1281, 1335-37 (1982). There the Commission held that "in light of our desire to maximize the options available to private land mobile eligibles in tailoring their communications systems to satisfy their particular communications requirements, we find that the public interest is served by continuing the practice

^{5/} The Commission defined a "shared use" agreement as:

[A]n agreement whereby two or more carriers share the use of a frequency. This can be accomplished through either time-sharing or through the operation of common transmitter facilities.

46 Rad. Reg. 2d (P&F) at 163 n. 8.

of multiple licensing of shared transmitters at 800 MHz." Of particular interest here, in that decision, the Commission stated:

[W]ith regard to the Commission's ability to administer and enforce its rules regarding multiple licensing. In March 1982, specific rules were adopted to govern multiple licensing. See Report and Order, Docket No. 18921, FCC 82-129 (released April 13, 1982). These rules are applicable both below and above 800 MHz. We adopted them confident of our ability to administer and enforce them. Nothing submitted in PR Docket Nos. 79-191 or 79-107 causes us to alter this conclusion.

Id. at 1337.

8. Indeed, in Amendment of Part 90, 93 F.C.C.2d 1127, 1128 (1983), the Commission, in affirming its decision in Private Land Mobile Radio Services, 89 F.C.C.2d 766 (1982),^{6/} explained that its prior orders had concluded that "shared and joint use of transmitters promoted the public interest by encouraging the larger and more effective use of radio in the public interest, as mandated by the [Communications Act]."^{7/} In fact, in that decision the Commission liberalized in certain respects the rules allowing multiple licensing of transmitters. Id. at 1131-34. Significantly, the Commission did not consider issues of control or responsibility cause to restrict sharing. In addressing these issues, this agency did hold that each licensee of a multiple licensed facility must have unlimited access to the facility and that each licensee would be held accountable for its use of the facility. See Private

^{6/} In that decision the Commission stated that the multiple licensing of facilities promoted spectrum efficiency, reduced operating costs, allowed licensees to be more responsive to day to day operational requirements, and facilitated the use of better transmitter site locations.

^{7/} See, e.g., Multiple Licensing--Safety and Special Radio Services, 24 F.C.C.2d 510 (1970).

Mobile Radio Services, 89 F.C.C.2d at 790. Those are appropriate regulations which would be equally applicable in other services licensees sharing transmitters.

9. Shared licensing of transmit facilities has been approved by this Commission in other contexts as well. In its proposed order in the Domestic Communications-Satellite Facilities proceeding, 34 F.C.C.2d 9, 38 (1972), for example, the Commission considered the shared use of transmit-receive earth stations to be a potential public interest benefit of requiring the sharing of common space segments. The order further contemplated that each carrier sharing the transmit-receive earth station would be separately licensed. Id. at 64. No concerns as to control or responsibility were raised in that proceeding.^{8/}

10. Moreover, in the broadcast services, the Commission regularly encourages new non-commercial mutually exclusive broadcasting applicants to enter into share-time agreements. See, e.g., New York University, 17 Rad. Reg. 2d (P&F) 104, 119-125 (1969). In fact as the Commission has noted, the broadcast rules specifically contemplate share-time agreements, see Rule Sections 73.561 and 73.1715, which are characterized by dual licensees who have agreed to share portions of the broadcast day on the same or similar technical facilities. Part Time Programming, 82 F.C.C.2d 107, 117 n.18 (1980). Again, the Commission has not appeared to have a serious concern with issues of control or responsibility.

^{8/} See also Public Broadcasting Service, 70 F.C.C.2d 1853, 1855-57 (1979). Public Broadcasting Service, 63 F.C.C.2d 707, 711 (1977).

11. In sum, in no other service has the Commission appeared troubled by the dual or multiple licensing of transmitters. Such multiple licensing has been common in the public land mobile services in such instances as cellular base stations located near MSA or RSA borders and in the sharing of paging transmitters in rural areas as a cost savings measure. Despite this lengthy history of dual licensing, issues of control and responsibility have not seemed to arise. In light of the above discussion, the Commission should reconsider its decision in this proceeding and allow the joint licensing and sharing of transmitters.

II. Prohibiting licensees' sharing of transmitters would create hardships for designated entities and result in inefficient use of resources.

12. Congress gave the Commission a mandate to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. Section 309(j)(4)(D). In carrying out this mandate, the Commission has acknowledged Congress' recognition of the difficulties businesses owned by members of minority groups and women face in accessing capital because of discrimination in the private lending market.^{9/} In implementing the Congressional mandate for designated entity participation in the provision of PCS, the Commission promised to find ways to remedy such barriers to participation.^{10/} However, by prohibiting the shared use of

^{9/} Implementation of Section 309(j), 9 FCC Rcd 5532, 5573 (1994).

^{10/} Id. at 5575-76.

transmitters, the Commission is creating a significant barrier to full participation of designated entities in the provision of spectrum-based services.

13. Whereas entrenched carriers possess greater capital resources to enable them to construct a multitude of individual transmitters, designated entities trying to establish themselves in the industry often face significant financing hurdles. Sharing the capital expense of constructing and maintaining transmitters would allow designated entities to better use their more limited resources. In the end, such sharing would provide designated entities with the opportunity to more effectively compete with established service providers.

14. The shared use of transmitters makes economic sense in several other ways. It is cost effective in that shared use would prevent the duplication of facilities. It would allow licensees to locate transmitters at optimal locations, which would ultimately benefit consumers in the form of increased quality of service and potentially lower costs. Further, as concerns about radio frequency radiation continue to become more prevalent, pollution of the airwaves with duplicate, perhaps unnecessary, transmitters will find little or no economic or environmental justification. Finally, the resources required to construct duplicate transmitters will mean less resources a licensee--and particularly a designated entity licensee already facing potential capital problems--can invest in maintenance and repair of their transmitters.

15. Finally, narrowband PCS will provide licensees the opportunity to provide advanced, two-way paging. Unlike tradition-

al paging systems, which must broadcast across all transmitters, a narrowband PCS system benefits from the acknowledgment feature which actually locates the end user. The pager is always sending back a signal telling the system where it is located, and pinpointing the specific transmitter needed. As a result, such technology increases reliability and control and lends itself to shared use of transmitters.

III. Conclusion.

16. As outlined above, shared transmitter use has found Commission sanction in other services, with apparently no significant concerns with the control or responsibility of transmitter operations. The Commission's vague concerns regarding control and responsibility for transmitter operations are not justification for a prohibition that will serve to further handicap designated entities' ability to compete and which will result in an inefficient utilization of resources. Accordingly, PCSD requests the Commission to reconsider its decision to prohibit the shared use of transmitters by multiple licensees.

Respectfully submitted,

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